Mirza Mohamed Tariq Beg bin Mirza HH Beg v Margaret Low Saw Lui & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2036 OF 2010
LOW HOP BING, SURIYADI JJCA AND ALIZATUL KHAIR J
2 MARCH 2012

Civil Procedure — Appeal — Application to produce new evidence — Adducing fresh evidence — Whether requirements satisfied — New evidence not having determining influence — Rules of the Court of Appeal 1994 r 7(1) & (3A) — Courts of Judicature Act 1964 s 69(1)

The appellant filed a petition under s 181 of the Companies Act 1965 ('the petition') alleging oppression by the respondents in their conduct and management of the respondent No 8. The High Court dismissed the petition and the appellant appealed against that decision. By way of notice of motion, filed under s 69(1) of the Courts of Judicature Act 1964 ('s 69(1)') read together with r 7(1) and (3A) of the Rules of the Court of Appeal 1994 ('r 7(1) and (3A)'), the appellant prayed for an order to adduce and read the affidavit affirmed by the appellant and the exhibits therein as further evidence. The appellant claimed that certain reports had recently surfaced and were relevant to the appeal.

Held, dismissing the notice of motion with costs:

(1) The law regulating the admissibility of further evidence in the Court of Appeal is found in s 69(1) and r 7(1) and (3A). Section 69(1) and r 7(1) provide for the general rule that the Court of Appeal shall have all powers and duties to receive further evidence eg by affidavit. However, the general rule must be read with r 7(3A) which states that, at the hearing of the appeal, further evidence shall not be admitted, unless the court is satisfied that (a) at the hearing before the High Court, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and (b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court (see paras 8–10); *Datuk Seri Panglima bin Mohd Sari Datuk Hj Nuar v Vee Seng Development Sdn Bhd & Ors* [2009] 6 MLJ 643 (CA) referred; *Hue Ngee On v Chai Woo Siew (as public officer of the Hakka Association Kulai, Johor)* [2009] 5 MLJ 176 (CA) referred.

(2) The issues raised in the reports did not relate to the appeal proper nor did

they indicate any support thereof. Further, the reports were not comprehensive and did not contain the respondent No 8's response and explanations. While the reports may be new evidence and fulfilled condition r 7(3A)(a), they could not be said to have a determining influence upon the decision of the High Court or the outcome of the appeal proper. The report did not raise anything to support the appellant's allegations in the petition (see para 13).

[Bahasa Malaysia summary

Perayu memfailkan petisyen di bawah s 181 Akta Syarikat 1965 ('petisyen') mendakwa penindasan oleh responden-responden dalam tingkah laku mereka dan pengurusan responden No 8. Mahkamah Tinggi menolak petisyen tersebut dan perayu merayu terhadap keputusan tersebut. Melalui notis usul difailkan di bawah s 69(1) Akta Mahkamah Kehakiman 1964 ('s 69(1)') dibaca bersama dengan k 7(1) dan (3A) Kaedah-Kaedah Mahkamah Rayuan 1994 ('k 7(1) dan (3A)'), perayu memohon untuk perintah untuk mengemukakan dan membaca afidavit yang disahkan oleh perayu dan ekshibit-ekshibit yang terdapat di dalamnya sebagai keterangan tambahan. Perayu mendakwa bahawa laporan-laporan tertentu telah timbul baru-baru ini dan adalah relevan kepada rayuan tersebut.

Diputuskan, menolak notis usul dengan kos:

(1) Undang-undang yang mengawal kebolehterimaan keterangan tambahan di Mahkamah Rayuan didapati di dalam s 69(1) dan k 7(1) dan (3A). Seksyen 69(1) dan k 7(1) memperuntukkan kaedah am bahawa Mahkamah Rayuan mempunyai kesemua kuasa dan tugas untuk menerima keterangan tambahan seperti melalui afidavit. Walau bagaimanapun, kaedah am tersebut mesti dibaca dengan k 7(3A) yang menyatakan bahawa, pada pendengaran rayuan tersebut, keterangan tambahan tidak boleh dimasukkan, kecuali mahkamah berpuas hati bahawa — (a) pada masa pendengaran di hadapan Mahkamah Tinggi, keterangan baru tersebut tidak boleh diperolehi oleh pihak yang memohon untuk menggunakannya, atau bahawa usaha yang munasabah tidak akan membuatkannya sentiasa tersedia; dan (b) keterangan baru, jika benar, akan mempunyai atau akan mungkin mempunyai pengaruh penentuan ke atas keputusan Mahkamah Tinggi (lihat perenggan 8–10); *Datuk Seri Panglima bin Mohd Sari Datuk Hj Nuar v Vee Seng Development Sdn Bhd & Ors* [2009] 6 MLJ 643 (MR) dirujuk; *Hue Ngee On v Chai Woo Siew (as public officer of the Hakka Association Kulai, Johor)* [2009] 5 MLJ 176 (MR) dirujuk.

(2) Isu-isu yang dibangkitkan di dalam laporan-laporan tidak berkaitan dengan rayuan sebenar dan bukan juga ia menunjukkan apa-apa sokongan yang terdapat. Selanjutnya, laporan-laporan tidak menyeluruh dan tidak mengandungi jawapan dan penjelasan responden No 8.

Sementara laporan-laporan tersebut mungkin adalah keterangan baru dan memenuhi syarat k 7(3A)(a), ia tidak dapat dikatakan mempunyai pengaruh penentuan ke atas keputusan Mahkamah Tinggi atau keputusan rayuan sebenar. Laporan tersebut tidak membangkitkan apa-apa untuk menyokong dakwaan-dakwaan perayu di dalam petisyen tersebut (lihat perenggan 13).]

Notes

For cases an application to produce new evidence, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 934—936.

Cases referred to

Datuk Seri Panglima bin Mohd Sari Datuk Hj Nuar v Vee Seng Development Sdn Bhd & Ors [2009] 6 MLJ 643; [2009] 6 CLJ 102, CA (refd)

Hue Ngee On v Chai Woo Siew(as public officer of the Hakka Association Kulai, Johor) [2009] 5 MLJ 176; [2009] 5 CLJ 734, CA (refd)

Ladd v Marshall [1954] 1 All ER 745, CA (refd)

Legislation referred to

Companies Act 1965 s 181

Courts of Judicature Act 1964 s 69, 69(1)

Rules of the Court of Appeal 1994 r 7(1), 7(3A), (3A)(a), (b)

Appeal from: Petition No D-26-7 of 2009 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Renu Zechariah and Ho Sook Cheng with him) (Rosley Zechariah) for the appellant.

Say Ng (Fadzilla Ismail with her) (Raja Darryl & Loh) for the first respondent.

Alan Wong (Megat Abdul Munir with him) (Zain Megat & Murad) for the second and third respondents.

G Ragumaren (G Ragumaren & Co) for the seventh respondent.

Low Hop Bing JCA (delivering judgment of the court):

NOTICE OF MOTION

[1] The appellant's application by way of notice of motion, filed under s 69(1) of the Courts of Judicature Act 1964 (s 69(1)) read together with r 7(1) and (3A) of the Rules of the Court of Appeal 1994 (r 7(1) and (3A)), prays for an order to adduce and read the affidavit affirmed by the appellant and the exhibits therein as further evidence.

GROUNDS OF APPLICATION

[2] The appellant's grounds in support of this application are:

(a) further important and relevant evidence for a fair and proper settlement

and disposal of the appeal proper had recently surfaced, namely the reports dated 6 August 2010 and 12 November 2010 ('the reports') filed by the court-appointed receiver for Perunding Pakar Media Sdn Bhd, the respondent No 8 ('Pakar SB'); and

(b) there would be no prejudice to the respondents in the event further evidence is heard at the hearing of the appeal proper and such evidence is important, relevant and admissible pursuant to s 69 and r 7.

FACTUAL BACKGROUND

[3] On 29 January 2009, the appellant filed a petition under s 181 of the Companies Act 1965 ('the petition') in the Kuala Lumpur High Court alleging oppression by the respondents in their conduct and management of the respondent No 8 and that they have acted in a manner oppressive, discriminatory and prejudicial to him as a shareholder thereof. In the petition, the appellant sought, amongst others, the following orders:

(a) payment of his salaries, fees, remuneration and claims;

(b) production of the respondent No 8's documents and records; and

(c) for the respondents to purchase his shares in the respondent No 8.

[4] On 23 June 2010, the High Court dismissed the petition with costs. The appellant then appealed against that decision.

[5] The appellant was the former managing director of the respondent No 8, but remains a director and shareholder thereof.

[6] One Mr Sathiea Seelan a/l Manickam of Messrs Morison Anuarul Azizan Chew was appointed as the receiver for the respondent No 8 ('the receiver') pursuant to the court order dated 19 April 2010 vide Kuala Lumpur High Court Suit No D4-22–1417 of 2008.

[7] The receiver had prepared, inter alia, the second report in two volumes pertaining to the status of the respondent No 8. The second report was said to have been received by the appellant's solicitors on 22 November 2010.

GOVERNING PRINCIPLES

[8] The law regulating the admissibility of further evidence in the Court of Appeal may be found in s 69(1) and r 7(1) and (3A).

[9] Section 69(1) and r 7(1) provide for the general rule that the Court of Appeal shall have all powers and duties, inter alia, to receive further evidence eg by affidavit.

[10] However, the above general rule must be read with r 7(3A) which states that, at the hearing of the appeal, further evidence shall not be admitted, unless the court is satisfied that:

(a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

[11] Section 69(1), r 7(1) and (3A) have given statutory recognition to the principles enunciated in *Ladd v Marshall* [1954] 1 All ER 745: see *Datuk Seri Panglima bin Mohd Sari Datuk Hj Nuar v Vee Seng Development Sdn Bhd & Ors* [2009] 6 MLJ 643; [2009] 6 CLJ 102 (CA); and *Hue Ngee On v Chai Woo Siew(as public officer of the Hakka Association Kulai, Johor)* [2009] 5 MLJ 176; [2009] 5 CLJ 734 (CA).

[12] We note that the reports reveal the accounts of Pakar SB and its creditors and debtors, and state that Pakar SB could not pay creditors due to disagreement on which party and the amount to be paid.

[13] The issues raised in the reports do not relate to the appeal proper nor do they indicate any support thereof. Further, the reports were not comprehensive and do not contain the respondent No 8's response and explanations. While the reports may be new evidence and therefore fulfils condition r 7(3A)(a), they cannot be said to have a determining influence upon the decision of the High Court or the outcome of the appeal proper which relates to allegedly oppressive acts in the petition. The report did not raise anything to support the appellant's allegations in the petition.

[14] Although the appellant has averred that the reports would have a 'determinative influence' over the decision of the High Court, these averments remain bare assertions without condescending on particulars as to how the reports and the new evidence would have had over the alleged 'determinative

A influence'. We are of the view that the appellant has not fulfilled r 7(3A)(b).

CONCLUSION

B **[15]** On the foregoing grounds, we dismissed the appellant's notice of motion with fixed costs of RM8,000 to the respondents.

Notice of motion dismissed with costs.

C Reported by Kanesh Sundrum

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